

Federal Court



Cour fédérale

Date: 20090630

Docket: T-834-08

Citation: 2009 FC 690

Montréal, Quebec, June 30, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KEITH MYIOW

Applicant

and

MOHAWK COUNCIL OF KAHNAWAKE

and

COURT OF KAHNAWAKE

and

JUSTICES OF THE PEACE

JOSEPHINE CUROTTE, SAM KIRBY AND STEPHANIE CROSS

Respondents

and

ATTORNEY GENERAL OF CANADA,

and

MR. LINDSAY LEBORGNE,

as Electoral Officer, 2009 MCK Elections

and

MS. ARLENE JACOBS,

as Assistant Electoral Officer, 2009 MCK Elections

Mis en cause

REASONS FOR ORDER AND ORDER

[1] The Court fully agrees with the position of the Applicant. The Applicant is a native of Kahnawake, resides on the Kahnawake Reserve and is a full-fledged member of the Kahnawake Community.

[2] The Applicant was first elected as a Chief of the Mohawk Council of Kahnawake (“MCK”) in July 2000 for a term of two (2) years and after was re-elected in July 2002, July 2004 and July 2006 for a term of three (3) years, ending in July 2009.

[3] On February 2006, the “MCK” had passed a motion of non-confidence which was contested before this Court by the filing of an Application for judicial review (File **T-595-06**) which has been settled out-of-court after the re-election of the Applicant in July 2006.

[4] While the Applicant was in his mandate as a duly elected Chief, the “MCK” had again passed a motion of non-confidence on October 29, 2007 which was contested by the filing of an Application for judicial review as it appears in the present file (**T-834-08**).

[5] The 2009 MCK Elections have been called for July 4, 2009.

[6] On May 6, 2009, the *mis en cause*, **Lindsay LeBorgne**, acting as the Electoral Officer appointed in accordance with the MCK Election Law (**Exhibit P-32**), announced the following dates for the various activities related to the 2009 Election, as:

1. Saturday, May 30 : Nomination Day
2. Monday, June 22 : Candidates Night
3. Saturday, June 27: Special Advance Poll (This Special Advance Poll vote was to have been set aside by agreement of the parties and will have to be redone in accordance with this interim and interlocutory injunction.)
4. Saturday, July 4: Election Day

As appears from a copy of the “News Release”, served and filed as **Exhibit P-33**.

[7] In accordance and in respect of the “MCK” Election Law (**Exhibit P-32**), the Applicant filed a Declaration of Eligibility on May 30, 2009 with the appropriate forms attached as Schedules “B”, “C” and “D” for nomination for Council Grand Chief, as it appears from copies of those documents served and filed as **Exhibit P-34**.

[8] Also, on May 30, 2009, a “News Release” issued by the *mis en cause*, The Electoral Officer announced, notably, the Applicant’s nomination for the position of Grand Chief with two others nominees as it appears from a copy of the said Release served and filed as **Exhibit P-35**.

[9] However, in a letter dated June 5, 2009 and received by the Applicant on June 8, 2009, signed by the *mis en cause*, the Electoral Officer (**Lindsay LeBorgne**) and by the Assitant Electoral Officer (**Arlene Jacobs**), the Applicant was informed that his nomination for Grand Chief in the 2009 Election had been refused for the following reasons:

- A) You did not end your previous term of office in good standing this being an essential eligibility requirement under section 15.1(g) of the *Mohawk Council of Kahnawake Election Law*. This

information has been confirmed by MCED #39/2007-2008 and by the written judgment of the Court of Kahnawake issued on the 1st of Ohiari:ha/June 2009, both documents are attached herewith.

As it appears from a copy of the letter and the attached documents served and filed as **Exhibit P-36**.

[10] As it appears from a document printed from the “MCK” website, served and filed as **Exhibit P-37**, the only official nominees for the position of Grand Chief are Mrs. Mike Delisle Jr. and Mr. Warren Lahache.

[11] As it appears from the previous “**Notice of Application**” and the “**Amended Notice of Application**” filed in the present file (**T-834-08**), the Applicant had contested vigorously as *ultra vires*, illegal, null and void the MCK motion of non-confidence and the decision of the Court of Kahnawake, which constituted the motives for the refusal of the Applicant’s nomination for Grand Chief in the 2009 Election (See **Exhibit P-36**).

[12] It is obvious that the present file (**T-834-08**), as it appears from the schedule established by an Order rendered by Prothonotary Tabib (April 28, 2009), will not be heard and decided in time by this Court for the 2009 Election fixed for next July 4, 2009.

[13] It is also obvious, that an appeal before the Court of Kahnawake, will not be heard and decided in time for the 2009 Election but, particularly, will be moot since the Court has already decided without hearing that the Applicant “did not leave his office in good standing as per Section

8.8 of the Mohawk Council of Kahnawake Disciplinary Measures Regulations” (See **Exhibit P-36**), establishing consequently the ineligibility of the Applicant as a nominee for the 2009 Election.

[14] In accordance with the jurisprudential tripartite test applicable in the matter, the Applicant has **serious issues to be tried**, that he will **suffer irreparable harm** if relief is not granted, and the Court agrees that the **balance of convenience does** favour him.

SERIOUS ISSUES TO BE TRIED

[15] As it appears from the voluminous Notices of Application filed in the present file, the Applicant has serious issues to be tried and to be decided by this Court, as a *prima facie* analysis demonstrates.

[16] The grounds for the judicial Review of the motion of non-confidence of the “MCK” and the proceedings before the Court of Kahnawake are as follows:

- 16.1. Regarding the non-confidence vote and the removal of the Applicant from his office as an elected Chief of Mohawk Council of Kahnawake, acting as a Federal Board, the Respondent, the Mohawk Council of Kahnawake, is subject to judicial review by this Court to examine whether the Court of Kahnawake:
 - 16.1.1 Had no jurisdiction to adopt the Mohawk Council of Kahnawake Disciplinary Measures Regulations (**Exhibit P-9**) and, **SUBSIDIARILY**, those regulations could not be applied as disciplinary measures against an elected Chief;
 - 16.1.2 Had no jurisdiction and acted *ultra vires* by removing the Applicant from his office as an elected Chief member of the Mohawk Council of Kahnawake while his term was not completed;

- 16.1.3 Had no jurisdiction to remove the Applicant from his office as an elected chief in a situation other than those provided for by Section 78(2) of the *Indian Act*;
- 16.1.4 Had no jurisdiction to give to the Respondents, the Justices of the Peace or the “Court of Kahnawake”, jurisdiction of an Appeal or a review of a vote of non-confidence adopted against a democratically elected chief such as the Applicant;
- 16.1.5 Had no jurisdiction and acted *ultra vires* by removing the Applicant from his office of elected Chief in contravention.

IN ADDITION, THE APPLICANT WILL PRESENT IN JUDICIAL REVIEW A REQUEST TO EXAMINE WHETHER:

- 16.1.6 The process followed by the Mohawk Council of Kahnawake that led to the vote of non-confidence and the removal of the Applicant from his office of elected Chief was clearly in violation of its duty to act fairly, the right owed by the Applicant for a procedure fairness, his right to have a sufficient and compute notice prior to the vote, his right to Counsel, his right to a fair process of investigation and the respect of the natural principles;
- 16.1.7 The Mohawk Council of Kahnawake has based its vote of non-confidence arbitrarily, on erroneous findings of facts, perceptions and subjective impressions which were made in a perverse and capricious manner, without consideration for the exact and objective facts it possessed and without respect for the principles of natural justice and procedural fairness that was required by the law;
- 16.1.8 The vote of non-confidence was unreasonable in the light of the facts established by Mrs. Cree’s Report to the effect that the Applicant had acted in good faith, within his functions and responsibilities of his Portfolio, using an appropriate procedure and without causing any prejudice to anyone;
- 16.1.9 The vote of non-confidence passed by the Mohawk Council is the direct result of political strategies, conflict of interests, based on misrepresentations and is the continuation of the constant harassing and “political saga” against the Applicant which began with the first non-confidence motion which was contested before this Honourable Court in the file T-595-06;

- 16.1.10 The conduct and the decision of the Mohawk Council in adopting such non-confidence votes clearly shows its refusal to respect the democratic choice of the members of the Community in electing the Applicant as a Chief on numerous occasions;
- 16.2. With respect to the jurisdiction and the “decisions” of the Respondents the Court of Kahnawake and the Justices of the Peace, the Applicant will, further, add in judicial review, a request for an examination as to whether:
- 16.2.1 The Court and the Justices of the Peace had no jurisdiction, acted *ultra vires* and/or exceeded their jurisdiction by becoming involved in the matter relating to the Applicant in his quality of elected Chief, member of the Mohawk Council of Kahnawake;
- 16.2.2 The Court and the Justices of the Peace acted *ultra vires* and have usurped the powers of this Court by hearing several motions and rendering decisions “in appeal” and/or “in revision” of decisions of the Mohawk Band Council to the effect of removing the Applicant of his functions as an elected Chief member of the Mohawk Council of Kahnawake;
- 16.2.3 The Court and the Justices of the Peace have no jurisdiction, have acted *ultra vires* and have exceeded their jurisdiction in acting as the Justices of the Peace, sitting on a “bench of three” as a Court in an appeal revising a disciplinary measure imposed to the Applicant as an elected Chief, member of the Mohawk Council of Kahnawake;
- 16.2.4 The Court and the Justices of the Peace have acted illegally and have disregarded the Applicant’s rights to the most elementary rules of natural justice by refusing to hear the Applicant, by refusing to treat him with impartiality, by refusing to recuse themselves on the basis of reasonable apprehensions of bias having been alleged and established, by illegally rendering a decision jeopardising the Applicant right to a public hearing, before an impartial and independent Tribunal under the standard rules of evidence in such a matter;
- 16.2.5 The Court and the Justices of the Peace have acted *ultra vires* and exceeded their jurisdiction by refusing to recognize the Applicant’s right to be heard and to submit his very serious questions of law related to their lack of jurisdiction “*rationae materiae*” and by deciding “*proprio motu*” that they had jurisdiction alleging a declaratory decision rendered by a Justice of the Peace (**Exhibit P-25**) which was irrelevant and had no bearing whatsoever with the matter involved in the present;

16.2.6 The Court and the Justices of the Peace have acted *ultra vires*, have committed a “déli de justice” and have exceeded their jurisdiction by publishing a Press Release (**Exhibit P-27**) to the effect that they have rendered a decision “dismissing the Applicant’s Appeal and upholding the decision of the Mohawk Court of Kahnawake to remove Chief Myiow” despite the fact no appeal had been heard on the merits, that the hearing held on March 19th 2009, had been suspended as so understood by all parties and their respective Councils and that, the Court and Justices of the Peace had been notified that their decision ruling they had jurisdiction would be challenged before this Court and, finally, that the Applicant could not proceed since his principal witness Mr. Louis Delisle, from whom the original complaint originated, was absent and since he was scheduled to be their first witness. (On the merits, all the previous proceedings of both parties in regard to the decision of the Court of Kahnawake to remove Chief Myiow will be subject to examination).

[17] According to the above cited grounds for the Judicial Review, the Applicant will present evidence to examine whether:

TO DECLARE, that the Respondent, the Mohawk Council of Kahnawake, has acted *ultra vires* and without jurisdiction in enacting the **Disciplinary Measures Regulations (Exhibit P-9)**, **OR** **SUBSIDIARILY TO DECLARE** the Regulations could not be applied to the Applicant an elected Chief;

TO DECLARE, that the Respondent, the Mohawk Council of Kahnawake, has acted *ultra vires* and without jurisdiction by giving the “Court of Kahnawake” and The Justices of the Peace jurisdiction to decide on an appeal and/or revision of a decision taken by the Mohawk Council of Kahnawake;

TO DECLARE, that the Respondent, the Mohawk Council of Kahnawake, has acted *ultra vires* and without jurisdiction in adopting a motion of non-confidence against the Applicant having directly the consequence that he was removed from his office and duties as an elected Chief for the rest of his term all in contravention of the democratic principles established by the *Canadian Bill of Rights*, the *Charter of Rights* and the unwritten constitutional principles;

TO DECLARE, that the Respondent, the Mohawk Council of Kahnawake, has acted *ultra vires* and without jurisdiction in adopting

and acting under other situations than those established by the *Indian Act* (Section 78(2)) to exclude the Applicant of his office, duties and activities as a Chief, member of the Kahnawake Band Council, duly elected by the members of Kahnawake Community;

TO DECLARE, that the Respondents, Josephine Curotte, Sam Kirby and Stephanie Cross, as Justices of the Peace, have no jurisdiction and no competence according to the *Indian Act*, the *Criminal Code*, the *Courts of Justice Act*, the *Code of Penal Procedure* and any other laws applicable to the present instance, on a matter such as the removal of an elected Chief such as the Applicant;

TO DECLARE, that the Respondents, Josephine Curotte, Sam Kirby and Stephanie Cross, as Justices of the Peace directly paid by their employer the Mohawk of Kahnawake, did not present guarantees of impartiality needed from a tribunal;

ALSO, THE APPLICANT WILL REQUEST ON JUDICIAL REVIEW AN EXAMINATION AS TO WHETHER:

TO DECLARE, that the Respondents, Josephine Curotte, Sam Kirby and Stephanie Cross have acted *ultra vires* and exceeded their jurisdiction in their decision dates on May the 2nd 2008 (**Exhibit P-21**) establishing that the hearing shall be “in camera” and denying the motion for the Recusal of the Justices of the Peace “Josie” (sic) Curotte and Sam Kirby;

TO DECLARE, that the Respondents, Josephine Curotte, Sam Kirby and Stephanie Cross have acted *ultra vires* and exceeded their jurisdiction in their verbal decision dated on March 19th 2009, and have violated the principles of natural justice, especially that of *audi alteram partem* rule, in refusing to hear the very serious jurisdictional arguments of the **Applicant**, and **TO DECLARE** void and null that decision;

TO DECLARE, that the Respondents, Josephine Curotte, Sam Kirby and Stephanie Cross have acted *ultra vires* and exceeded their jurisdiction, and violated the principles of natural justice in their “decision” dated May 2nd (**Exhibit P-21**) and **TO DECLARE** void and null that decision;

TO ISSUE, DETERMINE AND GRANT any declaratory relief and order for relief in the nature of the Applicant against his illegal and

unlawful removal from his elected office of Chief of the Mohawk Council of Kahnawake;

TO DECLARE that the non-confidence Vote (**Exhibit P-1**) was illegal, *ultra vires* and abusive, made in bad faith and against the principles of natural justice, the procedural fairness and that the Mohawk Council of Kahnawake has acted in an arbitrary and discrimination manner in violation of the Applicant's fundamental rights;

TO DECLARE unlawful, invalid, null and void and **QUASH** the non-confidence Vote held on October 2007 and the removal of the Applicant as an elected Chief of the Mohawk Council of Kahnawake;

TO DECLARE that the Respondent, the Mohawk Council of Kahnawake, had no jurisdiction to adopt the **Disciplinary Measures Regulations (Exhibit P-9) OR SUBSIDIARILY TO DECLARE** that the **Regulations** could not be applied to the Applicant as an elected Chief;

TO DECLARE that the Applicant, **Keith Myiow**, is still Chief and member of the Mohawk Council of Kahnawake for the rest of his term.

[18] For all these reasons, the Applicant has demonstrated a *prima facie* case and the existence of serious issues to be tried by this Court.

IRREPARABLE HARM

[19] The Applicant's nominee position for Grand Chief is a prestigious honor within the tribe and significant in the Community as certain members of the Community have asked him to be such a nominee.

[20] The Applicant, in accordance to the MCK Election Act, has filed a Declaration of Eligibility (**Exhibit P-32**) which respects all the prescriptions of the law.

[21] The Applicant has submitted his candidature democratically in the universal suffrage of the members of the Kahnawake Community, and has let them choose whether he is to be Grand Chief.

[22] In respect of the 2009 Election which is scheduled for July 4, 2009, the Applicant has demonstrated an imminent irreparable harm. In reality, it is obvious that non-participation of the Applicant to the 2009 Election cannot be quantified in monetary terms and cannot be remedied in any other manner.

[23] Taking into account that the candidacy to the function of Grand Chief is directly relevant to the Applicant's personal rights, he will be the only one to suffer an irreparable harm if he could not be a nominee in the 2009 Election.

THE BALANCE OF CONVENIENCE

[24] On this issue, the balance of convenience favours the Applicant while the irreparable harm that would be caused to the Applicant if the injunction order is not now granted (3 days prior to the election) and should subsequently be considered on the merits, outweighs the harm likely to be caused to the Respondents and any other interested person.

[25] The Applicant and the voters, members of his Community, will obviously suffer irreparable harm if an injunction order is not granted.

[26] Consequently, the balance of convenience favours the Applicant and the voters.

[27] This Motion is well founded in fact and in law.

ORDER

THIS COURT ORDERS THAT:

1. **AN INTERIM INJUNCTION** be granted for the purpose of the forthcoming election on July 4, 2009 ordering to the *mis en cause*, the Electoral(s) Officer(s) of the 2009 Election of the Mohawk Council of Kahnawake and the Mohawk Council of Kahnawake:

TO ACCEPT the nomination of the Applicant, Mr. Keith Myiow for Grand Chief in the 2009 Election scheduled for July 4, 2009;

TO DECLARE the Applicant, Mr. Keith Myiow, eligible for the nomination of Grand Chief in the 2009 Election scheduled for July 4, 2009 with all the rights and privileges attached to a nominee by virtue of the Mohawk Election Law;

TO PLACE the name of the Applicant, Mr. Keith Myiow, on the ballot for the Election Day, scheduled for July 4, 2009, to run for Grand Chief in the Election;

TO PUBLICIZE widely and in any manner, the Order of this Court granting this interim injunction;

2. **FURTHERMORE**, the interlocutory injunction of this Court orders the *mis en cause*, the Electoral(s) Officer(s) of the 2009 Election of the Mohawk Council of Kahnawake and the Mohawk Council of Kahnawake:

TO ACCEPT the nomination of the Applicant, Mr. Keith Myiow for Grand Chief for the 2009 Election scheduled for July 4, 2009;

TO DECLARE the Applicant, Mr. Keith Myiow, eligible for the nomination of Grand Chief in the 2009 Election, scheduled for July 4, 2009 with all the rights and privileges attached to a nominee by virtue of the Mohawk Election Law;

TO PLACE the name of the Applicant, Mr. Keith Myiow, on the ballot papers for the Election Day, scheduled on July 4, 2009, to run for Grand Chief in the Election;

TO PUBLICIZE widely and in any manner, the Order of this Court granting this interlocutory injunction;

THE COSTS are in the cause.

(All, in this matter, is subject to an eventual proceeding on the merits as soon as is practicable for the parties and the Court.)

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-834-08

STYLE OF CAUSE: **KEITH MYIOW v. MOHAWK COUNCIL OF
KAHNAWAKE ET AL**

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 30, 2009

**REASONS FOR ORDER
AND ORDER:** SHORE J.

DATED: June 30, 2009

APPEARANCES:

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Mr. Benito Aloe FOR THE RESPONDENTS

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